

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 468

GERMAN-AMERICAN VOCATIONAL LEAGUE, INC., D. A.
B. RECREATIONAL RESORT INC., OTTO BREMER
ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE THIRD CIRCUIT*

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

On June 2, 1944, petitioners were convicted in the District Court for the District of New Jersey of conspiracy to violate the Foreign Agents Registration Act of 1938. Their convictions were affirmed by the Circuit Court of Appeals for the Third Circuit on January 31, 1946 (153 F. 2d 860), and a petition for

writs of certiorari was denied by this Court on April 29, 1946 (Nos. 925-933, Oct. T. 1945).

Thereafter, on June 4, 1946, a little more than two years after the judgments of conviction, petitioners obtained from the district court an order requiring the Government to show cause why a new trial should not be granted on the ground of newly discovered evidence (R. 3). Insofar as the affidavits in support of the motion related to the trial of the case, they alleged that a German propaganda film, "The Triumph of Will," which was shown to the jury during the trial as part of the Government's case, was not the same film as that shown at the meetings of the Vocational League, and that the film sent to the circuit court of appeals as an original exhibit in the case was not the same film as that shown to the jury (R. 5-9). In addition, the affidavits alleged that the entire prosecution was part of a conspiracy by officials of the Department of Justice against persons of German origin (R. 4-5, 9-23). The district court denied the motion, and petitioners appealed (R. 1). On the motion of the United States Attorney, the circuit court of appeals dismissed the appeal (R. 26-27), stating in a per curiam opinion (R. 26; 156 F. 2d 235):

The matter offered by the appellants, allegedly constituting newly discovered evidence, insofar as any part thereof is pertinent, is old and was before the court below at the trial and was before this court on the appeals.

Consequently the court below committed no error in refusing a new trial and the motion of the United States to dismiss the present appeals will be granted. * * *

The decision of the court below is clearly correct. Even assuming that petitioners' motion was timely,¹ their contention that the film exhibited to the jury was not the same as the film shown at the meetings was raised at the trial and was discussed by the circuit court of appeals in affirming the convictions. 153 F. 2d at 865. Since the film was only a minor part of the evidence against petitioners (see Brief for the United States in Opposition, Nos. 925-933, Oct. T. 1945, pp. 6-21), and the circuit court of appeals was not obliged to view the film in order to determine that there was sufficient evidence to support the verdict, the alleged substitution of the exhibit sent to the circuit court of appeals would be immaterial. The trial court therefore properly ruled that petitioners had presented no newly discovered evidence justifying a new trial, and its judgment in the exercise of its discretion in this respect presents no question for review by this Court.

¹ Petitioners' motion for a new trial was made a little more than two years after the judgments of conviction. Rule 33 of the Federal Rules of Criminal Procedure, effective March 21, 1946, provides that a motion for a new trial on the ground of newly discovered evidence "may be made only before or within two years after final judgment." It is our view that "final judgment" as used in the rule refers to the judgment of conviction rather than to the judgment on appeal or on petition for certiorari.

We therefore respectfully submit that the petition for a writ of certiorari should be denied.

✓ J. HOWARD McGRATH,
Solicitor General.

✓ THERON L. CAUDLE,
Assistant Attorney General.

✓ ROBERT S. ERDAHL,
✓ BEATRICE ROSENBERG,
Attorneys.

SEPTEMBER 1946.